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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re MANUEL RENE ACOSTA,	E063355
on Habeas Corpus.	(Super.Ct.No. RIF146283)
	OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Reversed with directions.

J. Courtney Shevelson under appointment by the Court of Appeal, for Defendant and Petitioner.

Kamala D. Harris, Attorney General, and Tami Falkenstein Hennick, Deputy Attorney General, for Respondent.

Petitioner Manuel Rene Acosta, defendant in the trial court proceedings (defendant) filed a petition for writ of habeas corpus, arguing that his conviction for first degree murder cannot stand because the jury was instructed that it could convict him based on the now-discredited (at least in this context) theory of "natural and probable

consequences." (See *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*).) We agree that the record does not demonstrate beyond a reasonable doubt that the jury did not rely on this theory in returning its verdict. Accordingly, we will grant the relief requested by reducing the conviction to second degree while offering the People the option of retrying defendant on the alternate theory of aiding and abetting. (See *Chiu* at p. 168.)

STATEMENT OF FACTS

The following statement of facts is taken primarily from our nonpublished opinion following defendant's appeal of his conviction.[1] (*People v. Donovan Avila* (May 7, 2013, E054855) [nonpub. opn.].) We note that testimony at trial was apparently not very clear as to the genesis of the killing or the crucial facts surrounding the actual murder. However, the People have never asserted that defendant was the actual killer and there was no evidence that he personally participated in the beating of the victim, although his statement denying this may have been untruthful.

Present at, and to some extent participating in, the murder were Avila, Windust,[2] and defendant. Avila and another acquaintance, Duncan, had recently been hanging out with one Watson, who became uncomfortable with Avila's boasting about "juice" in the

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[1] The petitioner has requested we take judicial notice of the direct appeal in case No. E054855. We hereby grant said request.

[2] Avila and Windust were tried by one jury, and Acosta by another. Avila was convicted of first degree murder. After the jury indicated that it had reached a verdict as to Avila but was hung as to Windust, the latter entered a plea of guilty to second degree murder, robbery, and burglary. Windust was sentenced to a total of 22 years eight months to life. Acosta's sentence was 32 years eight months to life. Avila's sentence was 38 to life.

community and being a "big dog" on the streets. Watson told Duncan not to come over with Avila; when the latter appeared at his home, Watson told him he was not welcome. Avila told Watson not to "stick his nose in the situation" or he would wind up a "casualty of war."

Meanwhile, the victim had confirmed Watson's concerns by telling him that Avila was a fake and a thief. These remarks found their way to Duncan, who duly relayed them to Avila. Avila was very angry and said that the victim was "dead." He spoke about setting up the victim through Windust at the latter's home.

Duncan warned the victim, who told a friend about Avila's threat and also told her that he had been prompted by the threat to buy a surveillance system for his home.

On the last night of his life, the victim told family members and a friend that he was going to buy a gun and "handle his beef" with Avila. He went to Windust's home to buy a gun, where instead he was met by Avila, Windust, and Acosta, and was beaten to death.

Shortly thereafter, Avila called Duncan and demanded that they meet. Avila, Windust and defendant arrived in the victim's car. Avila had a gun in his lap and specks of red on his shirt; defendant had a gun which he pointed at Duncan, asking the latter to tell them where the victim lived. Defendants entered the victim's home using the victim's keys, and took various items. Avila and defendant discussed the contents of the victim's safe; Avila commented that he was satisfied with what he had obtained.

A few days later, Avila took some friends to casinos, telling one friend he was a "killa" and that he had shot a man through the head because the man had disrespected him.[3] Avila said that the dead man would not go down, so he had to kick him down.

The victim's body was found several days later, bound and wrapped. The victim had been alive when he was bound. Cause of death was blunt impact injuries to the head.

After his arrest, defendant Acosta eventually admitted accompanying Avila to Windust's house, but claimed he did not know for certain why they were going there; he indicated that he thought he was going to provide Avila backup for a beating. He claimed not to have participated in the beating and told police that he, Avila, and Windust left the victim in the house while they went to the victim's home. Later, when he returned to the Windust's home, the victim was gone. He denied having anything to do with the disposal of the body.[4] He did, however, admit that he helped clean up the crime scene the next day with a power washer.

As the People concede, with respect to defendant the jury was instructed on two possible legal theories on which it could return a verdict of first degree murder. The court gave CALCRIM No. 401, which informed the jury that to find defendant guilty as an aider and abetter, it had to find that he was aware of Avila's intent to kill the victim

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[3] The victim's body was substantially decomposed when it was found and the autopsy was inconclusive as to whether the victim had been shot. However, his fingers were not removed, although at one point Avila told Duncan he had the victim's fingers in his pocket.

[4] Evidence from the victim's cell phone indicated that the victim's body remained at the murder site until at least the next day.

and intended to assist Avila in the murder. The court then gave an instruction on the "natural and probable consequences" theory, under which it was only required to find that Acosta intended to aid and abet in the commission of assault with force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4).)

In her closing argument to Acosta's jury (see fn. 2), the prosecutor stressed that Acosta and Avila were friends and lived close to each other. To support the theory that Acosta must have known of Avila's intent to kill the victim, she described Avila as a "chatterbox" and referred to the evidence that he had told other witnesses of his deadly plans for the victim. She also stressed Acosta's participation in the subsequent taking of the victim's property from the victim's home. The prosecutor noted the evidence that the victim was still alive when he was bound with duct tape and twine.[5]

However, although the prosecutor told the jury that she believed that the aiding and abetting theory of guilt "is more than applicable here," she also gave the jury the option of relying on the "natural and probable consequences" theory. This, she explained, would apply if the jury believed that Acosta only intended to assist in an assault as the "target crime." The jury was then told that it could return a verdict of first degree murder against Acosta if it found either that he and his companions were "lying in wait" for the victim or that the killing was premeditated.[6] (Pen. Code, § 189.) In her

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[5] This was shown not only by lividity but also by the obvious fact that there would have been no need to tie up a dead body.

[6] Neither the instructions nor the prosecutor's argument made it clear to the jury who had to premeditate the killing.

rebuttal argument, the prosecutor asserted that Acosta knew "that he was going there to serve as backup for a group beating . . . [that] caused Doug's [the victim's] death."

People v. Chiu

A defendant who assists another in the commission of a crime may be found guilty of a crime other than the target offense, if the second offense is a "natural and probable consequence" of the intended crime. (*People v. Medina* (2009) 46 Cal.4th 913, 920.) In *Chiu*, the Supreme Court held that one who aids and abets a crime resulting in death cannot be convicted of *first degree* murder under this doctrine unless the defendant share's the actual perpetrator's intent to kill. (*Chiu, supra,* 59 Cal.4th at pp. 166-167.) Otherwise, the court found that a conviction for second degree murder appropriately reflects the aider and abettor's culpability where the defendant has no intent to aid a killing. (*Id*. at p. 165.)

Chiu further holds that when a jury is instructed on two theories of guilt, one legally correct and one incorrect, the conviction must be reversed unless the reviewing court can conclude "beyond a reasonable doubt" that the jury based its verdict on the legally valid theory. (Here, and in *Chiu,* that of aiding and abetting a murder.) (*Chiu, supra,* 59 Cal.4th at p. 167.) The facts in *Chiu* were that a fight was planned between disputing high school students. The defendant told others that the friend he was supporting "would shoot if 'his friend feels pressured.' " However, the actual brawl did not involve either of the original disputants and was triggered by a different incident. During the fight, in which defendant participated, a coparticipant retrieved a gun from a

car and fatally shot one of the fighting youths. The evidence was in conflict as to whether defendant had urged the perpetrator to get the gun. (*Id*. at pp. 159-160.)

From its analysis of the jury's behavior during deliberation, the *Chiu* court concluded that the jury may have been focusing on the "natural and probable consequences" theory and therefore it could not say to the requisite standard that the jury did not base its verdict on the incorrect theory. In *People v. Chun* (2009) 45 Cal.4th 1172, dealing with a similar problem, the court was able to determine from *other* findings that in convicting the defendant of murder, the jury necessarily found facts justifying the conviction on the legally valid basis. Here, however, the Attorney General simply summarizes the evidence which we set out in somewhat more detail above, and concludes that "the record established that petitioner had knowledge of Avila's unlawful purpose, and that he acted with the intent or purpose of committing, encouraging, or facilitating the commission the killing [sic] of DiDominicus." The Attorney General notes that Acosta admitted that he "accompanied Avila to 'rough up' DiDominicus with the intent of backing Avila up" and points out that after the beating, and while the victim was left at Windust's house, Acosta aggressively forced a third party to tell them where the victim lived so he and his companions could take property from that location.

We fully agree that the evidence would have allowed the jury to return a verdict of first degree murder on a theory of aiding and abetting. However, we find it *not* sufficient to permit the conclusion beyond a reasonable doubt that it did so.

There was no *direct* evidence that Avila told Acosta that he intended to kill the victim, although he did make a statement reflecting such intent to Duncan (who did not participate in the crime). There was no evidence at all that Acosta was aware that a post-attack robbery (of the victim's vehicle) or burglary (of the victim's home) were planned (or even that this *was* the plan), although clearly he participated enthusiastically in those acts once the victim had in fact been rendered helpless and moribund.

On the other hand, Acosta's statements or admissions that he went with Avila to assist or facilitate a beating were not inherently improbable. The jury may even have felt that it would have been unreasonable for Acosta to have *expected* a murder, given that Avila's only grievance was being "disrespected."[7] Acosta's conduct after the beating is not strongly probative of his intent prior to the assault.

Furthermore, there is some value to the theory of "course of least resistance." The evidence of Acosta's intent and his knowledge of Avila's plan to kill was equivocal at best, and a proposal to convict on that basis might have led to spirited and lengthy debate. On the other hand, there was virtually no doubt that that the victim's death was, in the legal sense, a "natural and probable consequence" of an attack by at least two violent

[7] We realize this view does not take into account the frequency with which lives are lost over a scornful glance or ill-considered words. (See, e.g., *People v. Medina, supra,* 46 Cal.4th at pp. 922-923; *People v. Delgado* (2013) 213 Cal.App.4th 660, 665-665 [attempted murder].) However, jurors not immersed in a culture of violence and "respect" might find it reasonable for Acosta to have expected Avila to take his revenge merely by beating the victim.

men, with a third standing by if not actively participating.[8] Nor was there any doubt about Acosta's intent to facilitate an assault; he admitted as much. Hence, it is not unreasonable to suppose that the jury may well have just agreed "This is the easy way, let's go with 'natural and probable consequences.' "

DISPOSITION

Lacking any clues from which we could confidently determine that the jury did indeed make a finding of Acosta's intent and accordingly relied on the aiding and abetting theory, we are compelled to reverse the conviction. As did the court in *Chiu*, we will direct the conviction reversed to second degree unless the People, within 30 days of the finality of this opinion, inform the superior court of their intent to re-try defendant as an aider and abettor of the murder.

It will be so ordered.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.

[8] There was evidence that both Acosta and Avila were substantially bigger than the victim, who was five feet five inches tall and about 140 pounds at the time of his death. While Windust was not much taller, at the time of the murder he weighed about 200 pounds. Windust admitted to investigators that he struck the victim once with a bat.